

September 1, 2005

Rob Strong, AICP
Arroyo Grande Community Development Director
[Address Redacted]
Atascadero, CA 93422

**Re: Your Request for Advice
Our File No. A-05-154**

Dear Mr. Strong:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ Please note that the Commission does not act as a finder of fact when providing assistance; this assistance is based solely on the facts you provide. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. Having already determined on your own that you are a public official with a conflict-of-interest, may you attend, and possibly express your views at, city council public hearings regarding a development project which covers real property upon which you and your wife possess an option to purchase?

2. If the answer to the above question is “no,” are you still precluded from expressing your views if you resign your position as a public official?

CONCLUSIONS

1. Based upon the facts that you have provided, you may attend the city council’s hearings and express your views about the development project, as long as you take care

¹ Government Code sections 81000 – 91014. Commission regulations appear at title 2, sections 18109-18997, of the California Code of Regulations. All further references to statutory “sections” will be to the Government Code and all further references to “regulations” will be to title 2 of the California Code of Regulations, unless otherwise indicated.

to avoid giving the impression that you are speaking in the interest of any other person or group (other than your immediate family) or that you are acting in any official capacity.

2. Since the answer to Question One is “yes,” Question Two is now moot.

FACTS

You are and have been the Community Development Director in Arroyo Grande (“City”) since November 2001. In January of 2004, you obtained an option to purchase a two-acre parcel which contains an historic house in the City. The parcel is an integral part of nine acres designated on the City’s 2001 General Plan for single-family residential development (the “Project”).

Having determined that you have a conflict-of-interest with regard to any governmental decisions regarding the Project, you sold part of your original option to an independent investor. In an August 25, 2005 telephone conversation with Commission counsel, you indicated that the portion of the original option that you retained provides you the right to purchase, if certain future contingencies are met, the historic house on a three-fifths acre parcel that would constitute a lot in the potential future subdivision of the Project. You also indicated that your current option is completely owned by you and your wife.

You have reported this potential conflict-of-interest from the beginning and have recused yourself from all neighborhood meetings, City review sessions and public hearings which have been conducted during the last year and a half. The city manager and one of the associate planners have administered the Project review and have made all staff recommendations.

However, you are very interested in the outcome of the administration of the Project and would like to express your personal opinions that the proposed subdivision and associated neighborhood are well planned and beneficial to the City.

Other area residents, including one of the city council members who appointed one of the planning commission members that have participated in these preliminary discussions, have suggested substantial revisions to the Project design and have advocated for an environmental impact report (“EIR”) rather than the staff-recommended Mitigated Negative Declaration (“MND”). After more than a year of consideration, the revised Project is finally approaching planning commission public hearings which you intend to avoid.

However, if the Project opponents prevail and the planning commission recommends an EIR, you would like to express your opinion before the city council that this is a procedural way to stop the Project. If the Project is delayed, your option on the two-acre parcel will be in jeopardy.

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence governmental decisions in which the official has a financial interest, unless some exception applies.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Reg. 18700(b).) The general rule, however, is that a conflict-of-interest exists whenever a public official makes a governmental decision which has a reasonably foreseeable material financial effect on one or more of his or her financial interests. (Section 87103.)

A. Steps 1, 2 & 3 – As Community Development Director, Are You Potentially A Public Official Making, Participating in Making, or Attempting Influencing a Governmental Decision In Which You Have A Financial Interest?

Step One: You are the Community Development Director in the City. In that capacity, you would be involved in working on decisions associated with the City's General Plan and, consequently, the Project. Because you are a member or officer of a local government agency, you are a public official under the Act. (Section 82048; see Reg. 18701(a) [defining "public official"].)

Step Two: You have described yourself as one who occupies a position which requires you to make, participate in making, or influencing governmental decisions regarding the details of the Project, within the meaning of sections 87100 & 87103. (See also Regs. 18702 – 18702.4.) Specifically, regulation 18702.3, at subdivision (a), defines what constitutes attempting to use one's official position to influence a decision of one's own agency. It states that an official is attempting to use his or her official position to influence a decision if, "for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence any member, officer, employee or consultant of the agency."

Step Three: A public official has a financial interest in a decision, within the meaning of section 87100, if it is reasonably foreseeable that the decision will have a material financial effect on any real property in which the official has an economic interest worth \$2,000 or more. (Section 87103(b); Reg. 18703.2.) An "interest in real property" is defined in the Act as including "any leasehold, beneficial or ownership interest or an option to acquire such an interest in real property located in the jurisdiction owned directly, indirectly or beneficially by the public official, or other filer, or his or her immediate family if the fair market value of the interest is two thousand dollars (\$2,000) or more." (Section 82033.) Because the option held by you and your wife qualifies as an "interest in real property" under the Act, and because we assume that the option is worth

at least \$2,000, we will assume that, for purposes of sections 87100 & 87103, you have an economic interest in the option.

Consequently, barring any applicable exception, you are prohibited from making, participating in making, or otherwise using or attempting to use your official position to influence any decision which will have a reasonably foreseeable material financial effect on any economic interest you may have. (Sections 87100 & 87103.) Since you have already determined that you have a conflict-of-interest, we will not detail Steps Four through Eight of the Commission's eight-step analysis and work from your assumption that you indeed have a conflict-of-interest. Instead, the remainder of our analysis will focus on exceptions to Steps Two and Three.²

B. Exceptions To Steps Two & Three – When Making, Participating In Making, Or Influencing A Governmental Decision In Which A Public Official Has A Financial Interest Is Not Prohibited.

Even if a conflict-of-interest is present, a public official may appear before his or her agency as a member of the general public in the course of its prescribed governmental function in order to represent himself or herself on matters related “solely” to his or her “personal interests.” (Reg. 18702.4(a)(2) & (b)(1).) Such an appearance, properly made, does not constitute making, participating in making, or influencing a governmental decision. An official's “personal interests” include, but are not limited to:

“(A) An interest in real property which is wholly owned by the official or members of his or her immediate family.

“(B) A business entity wholly owned by the official or members of his or her immediate family.

“(C) A business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercise sole direction and control.” (Reg. 18704.2(b)(1)(A) through (C).)

Subsection (b)(1)(A) of regulation 18702.4 is applicable to your option since it constitutes an interest in real property which is completely owned by you and your wife. (See Section 82033, *supra* [defining “interest in real property”].) Therefore, you would not be deemed to be making, participating in, or attempting to influence a governmental decision that would have a reasonably foreseeable material financial effect on your economic interests, if you appeared before the city council in the same manner as any other member of the general public for the sole purpose of representing you and your

² The Commission's complete eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest (regulation 18700, subdivisions (b)(1)-(8)) is discussed in the enclosed Commission pamphlet, “Can I Vote?” This document describes how one determines whether they have a disqualifying conflict-of-interest with regard to a particular governmental decision.

wife's joint interest in the described land option. (See Reg.s 18700(a), 18702.4(a) & (b)(1).)

Under the above-described exception, if you wish to address the city council as a member of the general public, you "must be careful to avoid giving the impression that [you are] speaking in the interest of any other person or group, or that [you are] acting in any official capacity." (*Hensley* Advice Letter, No. A-04-168.)

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: Andreas C. Rockas
Staff Counsel, Legal Division

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